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IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, **Plaintiff,** **v.** **STEVEN CARROLL DEMOCKER,** **Defendant.**	**Cause No. P1300CR20081339** **Division 6** **STATE'S RESPONSE TO DEFENDANT'S RENEWED MOTION TO STRIKE CERTAIN TESTIMONY AND EXHIBITS OF DAN WINSLOW AND ADMONISH THE JURY TO DISREGARD PORTIONS OF HIS TESTIMONY**

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The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits its Response to Defendant's Renewed Motion to Strike Certain Testimony and Exhibits of Dan Winslow and Admonish the Jury to Disregard Portions of his Testimony and requests that Defendant's Motion be denied. The State's position is supported by the following Memorandum of Points and Authority.

MEMORANDUM OF POINTS AND AUTHORITIES

The Court previously ruled it would "permit lay witnesses, trained witnesses and officers to testify about their observations." Minute Entry dated February 19, 2010, Pg. 1. Prior to Sgt. Winslow taking the stand on July 29, 2010, the defense team attempted to further limit his testimony and stifle the State's ability to admit evidence related to that

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testimony by asking the Court to preclude the photographs taken at the scene under the direction of Sgt. Winslow which show both the known and unknown tire tracks. The defense team claimed that under the previous rulings of the Court, preclusion was warranted. Defendant claimed the observations of the law enforcement witnesses in this case constitutes expert testimony. The Court did not allow Sgt. Winslow to testify as a lay witness as to his comparison of bicycle tire prints but did allow the photographs of his rolling of Defendant's bike tires near questioned bike tire impressions found at the crime scene. Rule 701, Ariz. R. Evid.

Defendant filed another Motion on the issue on August 2, 2010 which was summarily denied without a response by the State. Defendant renews their Motion after consideration of DPS Criminalist John Hoang's trial testimony. Criminalist Hoang's testimony has no bearing on the original decision because the criteria for photographs upon which he relies is more strict than that which applies to lay people.

I. Criminalist Hoang testified as an expert.

Defendant bases his argument on the fact that Mr. Hoang was only able to use four of the approximately 255 photographs taken by Sgt. Winslow in formulating his expert opinion that the bike's tire tread have similar "class characteristics" as the impressions based on the images. While the quality of the remaining photographs may not be to the exacting standards required for the expert opinion that Mr. Hoang was asked to provide, they are nonetheless admissible evidence in this case and have already been published to the jury.

The photographs depict the bicycle tire tracks and shoe prints around the victim's residence. They were taken during the investigation to document the location and type of impressions left by persons who were in the area of the crime scene. The photographs which

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compare Defendant's bicycle tracks to the bicycle tracks at the scene were also taken in conjunction with the investigation and are admissible as any other evidence submitted by a lay witness.

A jury is to consider all evidence, coming from both experts and lay witnesses, and assign the weight to each which it deems appropriate. A jury is not prevented from considering evidence which does not come from, or is not relied on by, an expert.

II. The jury is permitted to compare the tire impressions and reach is own conclusion.

The case of *State v. Amaya-Ruiz*, 166 Ariz. 152, 800 P.3d 1260 (1990) is instructive on the matter of a jury's authorization to compare evidence submitted at trial.

> B. Footprint analysis
>
> [29] At trial, the state introduced a photograph of the bloody footprint found near the victim's body and the tennis shoe worn by defendant at the time of his arrest. Detective Leo Duffner and Department of Public Safety criminologist Deborah Friedman were permitted to compare the print to the tread pattern of defendant's tennis shoe. Det. Duffner testified that the shoe and print were of similar design, while Ms. Friedman stated that she detected no dissimilarities. Neither stated that the shoe and the print were "a match." Det. Duffner testified that he had no formal education in shoe comparisons, and no foundational questions concerning shoe comparison were asked of Ms. Friedman. Defendant claims that the trial court improperly admitted the testimony of expert witnesses without proper foundation, over his objection. The trial court admitted the testimony as lay opinion.
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> Rule 701, Arizona Rules of Evidence, provides:
>
> > If a witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.
>
> Neither witness testified that the print matched the tread pattern on defendant's shoe. Rather, they merely related their personal observations that the patterns were similar. Even assuming, without deciding, that the admission of this testimony was error, the error was harmless. **The jury was permitted to compare a photograph of the bloody footprint to the shoe worn by**

> **defendant at the time of his arrest. Because the jury was permitted to reach its own conclusion as to the similarity or dissimilarity between the photograph and defendant's shoe**, any error in admitting the testimony of Det. Duffner and Ms. Friedman was necessarily harmless. Our court of appeals noted that even under the more restrictive rules of evidence in effect before 1977, lay opinion was rejected as merely superfluous, rather than prejudicial, when facts before the jury allow it to reach an independent conclusion. *State v. Killian,* 118 Ariz. 408, 413, 577 P.2d 259, 264 (App.1978). *See State v. Bryant,* 705 S.W.2d 559 (Mo.App.1986) (erroneous admission of opinion evidence concerning age of person leaving palm print was not prejudicial, because jury could observe and draw its own conclusion); *State v. Snyder,* 66 N.C.App. 191, 310 S.E.2d 799 (1984) (any error in allowing witness to speculate as to what photographs showed was harmless). *See also* M. Udall & J. Livermore, *Arizona Practice: Law of Evidence* § 21 at 25 n. 4 (2d ed. 1982).

166 Ariz. at 167-168, 800 P.2d at 1275 - 1276

This decision covers the admissibility of lay opinion testimony. However, it also demonstrates that a jury may compare evidence and reach its own conclusions as to its similarity.

CONCLUSION:

The fact that the Court precluded a witness (Sgt. Winslow) from stating his opinion of the similarity of the tire impressions does not prevent a jury from deciding the matter for itself and assigning the weight it deems appropriate. The photographs have independent probative worth under Rule 401. They illustrate the relevant testimony concerning the crime scene and assist the jury in evaluating it. Those photographs constitute the best evidence they can receive, other than actually observing the scene with their own eyes. The jury should not be forced to rely upon only expert testimony, but should be allowed to make their own judgments concerning the tire tracks at the scene.

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RESPECTFULLY SUBMITTED this 27th September, 2010.

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COPIES of the foregoing delivered this 30th day of September, 2010 to:

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